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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GEORGE L. KARAPINKA,

Petitioner

vs.

UNITED STATES GOVERNMENT,

Respondent

UNITED STATES DISTRICT
JUDGE CAROL LOS MANSMANN,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the district court can transfer venue without stating pusuant to which statute it is doing so,specially when the defendant did not request transfer pusuant to any statute and in the absence of any facts supporting such a transfer.

II. Whether the district court can transfer venue without ruling on plaintiff's motion to resolve the question of venue which was filed in the district court nine month before the issuance of the transfer order, precipitating thus needless appeals.

III. Whether the court of appeals in arriving at its decision can use documents submitted by the defendant, documents that were never filed in the district court.

IV. Whether the district court can file an appeal in the United States Court of Appeals for the plaintiff without his knowledge and against his will.

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Petitioner pro se prays that a writ of certiorari issue to review the questions presented above.

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the Third Circuit, Circuit Judge Weis, denied petitioner's Petittion for Writ of Mandamus with the Memorandum and Order dated December 6, 1982, a copy of which is anexed hereto as a-1*. The Opinion and the Order of the United States District Judge Carol Los Mansmann are anexed hereto as a-3 and as a-12 respectively.

JURISDICTION

The Petition for Writ of Mandamus was denied December 6, 1982; Petition for Rehearing was denied January 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

STATUTORY PROVISIONS

28 U.S.C. Sec. 1404(a): Change of Venue

(a) For the convenience of parties and

* Appendix below

witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

Petitioner's pro se complaint charging the United States Government with violation of Chapter VII of the Civil Rights Act of 1964, as amended in 1972, in dismissing him from his position of Research Chemist with the U.S. Department of Energy in August 1980 was filed June 8, 1981. He is seeking reinstatement to his former position with backpay, back benefits, and damages in excess of $10,000. Jurisdiction under 42 U.S.C. Sec. 2000e-16 is invoked.

July 17, 1981 U.S. Government filed the motion to dismiss for lack of venue in the Western District of Pennsylvania. In his response petitioner showed that the venue in the Western District of Pennsylvania was proper because due to his heath, justice could only be served in that District. Proper ve-

nue under 42 U.S.C. Sec. 2000e-5(f)(3) was confirmed by the District Court for the Western District of Pennsylvania by the Order dated October 30, 1981. In this Order U.S. Government's motion to dismiss was denied.

October 23, 1981 U.S. Government filed its motion to transfer the case to the Northern District of West Virginia (a-14,16). November 2, 1981 petitioner filed his Motion to Resolve the Question of Venue (a-17,18). The District Court so far did not rule on this Motion. By the Order of the Magistrate the U.S. Government was ordered to file a brief in support of its Motion by December 11, 1981, the petitioner was ordered to file his answer by January 8, 1982. December 9, 1981 U.S. Government's brief was served upon the petitioner. This brief was never filed in the District Court, as the Clerk's docket entries show. Petitioner's answer, which was ordered by the Magistrate November 17, 1981, was filed January 7, 1982 (a-20). The petitioner showed there that the Western District of Pennsylvania was un-

questionably the most convenient forum for everybody. January 14, 1982 the Magistrate issued her Report and Recommendation on this motion, recommending that the motion to transfer be denied, because the U.S. Government did not show any reasons for transfer; the parties were permitted ten days to file objections to Magistrate's Report and Recommendation. The U.S. Government did not file any objections.

January 13, 1982 the petitioner filed his Motion for Summary Judgment Hearing supported by the Affidavit of George L. Karapinka which showed that the petitioner was dismissed from his position with the U.S. Department of Energy on the basis of the perjurious testimony of the U.S. Governments witness. January 19, 1982 the Magistrate issued her Report and Recommendation, recommending that the motion for summary judgment(?) be denied, although the petitioner moved for the summary judgment hearing. Since no ruling by the District Court was

passed on this Motion for Summary Judgment Hearing in 30 days, the petitioner filed notice of appeal February 16, 1982. The appeal was dismissed by the U.S. Court of Appeals for the Third Circuit May 7, 1982 for lack of jurisdiction.

August 9, 1982 U.S. District Judge Carol Los Mansmann's Order (a-12) granted U.S Government's motion to transfer case to the Northern District of West Virginia. The attached Opinion of Honorable Carol Los Mansmann (a-4) states mistakenly, among other things, that the only unresolved motions are:"a Motion for Summary Judgment filed by the Plaintiff and a Motion to Transfer filed by the Defendant". Factually the Motion filed by the plaintiff was for Summary Judgment Hearing. Honorable Carol Los Mansmann fails to mention petitioner's pending Motion to Resolve the Question of Venue (a-17, 18) which was filed November 2, 1981. Judge Los Mansmann further suggests (a-7) that the

petitioner amended his complaint. The quoted information (a-7) was taken from the information supplied by the petitioner in answer to the Magistrate's questions; it was not an amendment to the complaint. The Honorable Judge concludes (a-9) that in his reading of 42 U.S.C. 2000e-5(f)(3) (pursuant to that statute the District Court confirmed the venue in the Western District of Pennsylvania on October 30, 1981), the venue is not proper in the Western District of Pennsylvania. Further the Opinion states (a-10) that the defendant seeks transfer of this action to the Northern District of West Virginia pursuant to 28 U.S.C. Sec. 1404(a). This statement is totally unsupported by the record, nowhere on the record did the U.S. Government seek the transfer pursuant to 28 U.S.C. Sec. 1404(a).

August 14, 1982 petitioner mailed his Motion for Stay of Order (dated August 9, 1982) to the District Court for the Western District of Pennsylvania. The District Court

never ruled on this Motion which was based on the Petition for Writ of Mandamus to the U.S. Court of Appeals for the Third Circuit, which was mailed to the Court of Appeals August 17, 1982.

By a copy of a letter dated August 17, 1982 from Gilbert W. Conley, Clerk District Court for the Western District Pennsylvania to Thomas F. Stafford, Clerk District Court for the Northern District of West Virginia the petitioner was informed that the District Court for the Western District of Pennsylvania had filed an appeal in petitioner's case.

August 27, 1982 petitioner received notification from the Court of Appeals for the Third Circuit that an appeal No. 82-5504 was filed in petitioner's case and a letter informing him that this appeal will be submitted to a panel for possible dismissal due to a jurisdictional defect. This appeal was filed for the petitioner against petitioner's will.

The Court of Appeals by the Order of October 19, 1982 directed the U.S. Government to file an answer to the petition for mandamus within twenty days.

November 4, 1982 a copy of the Brief by the United States in Opposition to Petition for a Writ of Mandamus containing irrelavant documents that were never filed in the District Court, was served.

November 13, 1982 petitioner mailed to the Court of Appeals for the Third Circuit his Motion to Strike the Brief by the United States in Opposition to Petition for a Writ of Mandamus. The reasons for this Motion were the facts: 1) the Court of Appeals directed the U.S. Government to file an answer not a brief (violation of Rule 21 of F.R.A.P.), 2) the brief was totally irrelavant to the U.S. Government's Motion to Transfer and to the Petition for a Writ of Mandamus, 3) the main reason for this Motion to Strike was the fact that the Brief contained documents never filed in the District

Court, namely the Brief in Support of Motion to Transfer with exhibits, as the Docket Entries of the District Court clearly show. The Court of Appeals did not rule on this motion to strike. Petitioner moved twice for the ruling on that motion to strike. By the Order of Circuit Judge Weis dated January 13, 1983, the motion to strike was denied, thus allowing into the Court of Appeals' record documents like the Brief in Support of Motion to Transfer which were never filed in the District Court.

By the Memorandum and Order dated December 6, 1982 (a-1), the U.S. Court of Appeals for the Third Circuit denied Petition for a Writ of Mandamus, and it suggested to the District Court a modification of the District Court's Order dated August 9, 1982.

December 16, 1982 the modified version (modification suggested by the Court of Appeals) of the Order to transfer (a-13), was received by the petitioner. The same day petitioner's Motion for Stay of that Order un-

til the resolution of instant Petition, was mailed to the District Court for the Western District of Pennsylvania. This Motion was denied.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the resolution by this Court of the questions presented in this Petition will eliminate the conflicting rulings on venue of the U.S. Court of Appeals for the Third Circuit, help streamline the judicial procedure, and eliminate needless appeals.

I. THE DISTRICT COURT CAN NOT TRANSFER VENUE WITHOUT STATING PURSUANT TO WHICH STATUTE IT IS DOING SO, SPECIALLY WHEN THE DEFENDANT DID NOT REQUEST TRANSFER PURSUANT TO ANY STATUTE AND IN THE ABSENCE OF ANY FACTS SUPPORTING SUCH A TRANSFER

There are several statutes governing venue. It is the accepted judicial procedure that when the district court rules on the question of venue, it refers to the particular statute(s) on which it is basing its decision.

The Honorable Los Mansmann, as his trans-

fer of venue Order (a-12) shows did not refer to any statute or to any other authority. The entire Opinion of the Honorable Los Mansmann (a-3) is devoted to his argument on improper venue of petitioner's case in the Western District of Pennsylvania pusuant to 42 U.S.C. 2000e-5(f)(3). The statement of Honorable Los Mansmann that the U.S. Government seeks transfer of the case pursuant to 28 U.S.C. 1404(a) (a-10) is not supported by the record. See Motion to Transfer Case to the Northern District of West Virginia (a-14) and the proposed order (a-16). Nowhere on the record did the U.S. Government request transfer pursuant to 28 U.S.C. Sec. 1404(a). This fact led to the preparation of petitioner's defficient Petition for a Writ of Mandamus. The Court of Appeals in its Memorandum and Order (a-1) denying petitioner's Petition for a Writ of Mandamus, suggested to Honorable Los Mansmann to modify his Order to include 28 U.S.C. Sec. 1404(a). The authority, 28 U.S.C. Sec. 1404(a), was included into the Or-

der (a-13) after the ruling of the Court of Appeals, making it impossible for the petitioner to raise that issue, the appropriatness of 28 U.S.C. Sec. 1404(a), in the Court of Appeals, thus necessitating this Petition for a Writ of Certiorari.

The record in the District Court and in the Court of Appeals for the Third Circuit and the rulings of the Courts show convincingly that the transfer of petitioner's case pursuant to 28 U.S.C. Sec. 1404(a) was not justified.

The unanimous ruling of the Courts on venue is that the plaintiff's choice of forum is of paramount importance. This ruling is summarized by the U.S. Court of Appeals for the Third Circuit in Shutte v. Armco Steel Corporation, 431 F.2d 22 at 25:

> "It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice"*** should not be lightly disturbed." Ungrund v. Cunningham Brothers, Inc., 300 F.Supp. 270, 272 (S.D.Ill.1969). In accord with that sound doctrine, one district court recently correctly observed:"The decision to trans-

fer is in the court's discretion, but the transfer is not to be liberally granted." Handlos v. Litton Industries, Inc., 304 F. Supp. 347, 352 (E.D.Wis.1969). The burden is on the moving party to astablish that a balancing of proper interests weigh in favor of the transfer, Everprest, Inc. v. Phillips-Van Heusen Corp., 300 F.Supp. 757 (M.D.Ala. 1969), and "*** unless the balance of convenience of the parties is strongly in favor of the defendant, the plaintiff's choice of forum should prevail." Owatonna Manufacturing Company v. Melroe Company, 301 F.Supp. 1296, 1307 (D.Minn.1969). (Emphasis supplied.)"

According to Shutte v. Armco Steel Corporation, supra, the Honorable Los Mansmann did not have a single ground for transfer of the case to the Northern District of West Virginia. The petitioner in his answer (a20) named his six witnesses and the locations from which they will have to travel to the site of the trial. The travel for these witnesses to Pittsburgh, Western District of Pennsylvania is unquestionably more convenient than to any location of the District Courtin Northern District of West Virginia. On the other hand, according to District Court's record, the U.S. Government did not name the witnesses it will be using at the

trial nor did it name the locations from which they will have to travel to the site of the trial. Considering the distances from Morgantown, W.V. to Pittsburgh, Pa. (70 miles) and from Morgantown to Clarksburg, W.V. (50 miles), therefore if the trial were to be held in Clarksburg W.V. and any of the witnesses were to travel there from Morgantown, W.V., it would be only 20 miles shorter on I-79 than to Pittsburgh, Pa. For the six petitioner's witnesses Clarksburg, W.V. would be very inconvenient. For example his three witnesses reside in Washington, D.C. and the regular roundtrip air fare on USAir from there to Pittsburgh, Pa. is only $190; but from Washington, D.C. to Clarksburg, W.V. it is $276 (December 14, 1982 quotes).

However, the main factor in favor of Pittsburgh location is petitioner's pro se health problem, see Affidavit of George L. Karapinka, a-18. For the petitioner pro se to drive every day from Morgantown to Clarksburg during a possibly long trial, would be

very prejudicious since he is his own attorney and driving will impare his courtroom performance. On the other hand if the trial were to be held in Pittsburgh, Pa. then the petitioner pro se could stay at his partial residence in his sister's home, avoiding any driving, in Pittsburgh, Pa. for the duration of the trial and thus he will be able to prosecute his case much better.

It has to be stressed that the Magistrate in her Report and Recommendation dated January 14, 1982 did not find a single fact to support the transfer of the case to the Northern District of West Virginia. She, therefore, recommended that the U.S. Government's motion to transfer be denied. U.S. Government had ten days to object; it did not.

The ruling of the U.S. Court of Appeals for the Third Circuit in denying petitioner's Petition for a Writ of Mandamus, and thus permitting the transfer of the case to the Northern District of West Virginia, was contrary to the ruling of the same Court in Shu-

tte v. Armco Steel Corporation, supra. This Petition for a Writ of Certiorari should, therefore, be granted.

II. THE DISTRICT COURT CAN NOT TRANSFER VENUE WITHOUT RULING ON PLAINTIFF'S MOTION TO RESOLVE THE QUESTION OF VENUE WHICH WAS FILED IN THE DISTRICT COURT NINE MONTH BEFORE THE ISSUANCE OF THE TRANSFER ORDER, PRECIPITATING THUS NEEDLESS APPEALS

The consensus of the Courts for the need of a venue hearing, in cases where there are questions in regard to the facts warranting a transfer of venue, is best expressed by the ruling in Plum Tree, Inc. v. Stockment, 488 F.2d 754 (3rd Cir. 1973) at 756:

> "We do not hold that a hearing is necessarily required on every transfer motion, but where,as here, the evidence and arguments supporting transfer were in doubt, a hearing or conference would have been desirable before the district court decided the motion. ... The more significant difficulty here, however, is that there was no evidence before the district court upon which it could base a finding that the transfer order was justified."

The situation in this case under consideration is very similar to Plum Tree, Inc. v. Stockment. Moreover, in the instant case the

petitioner filed a motion for a venue hearing, Motion to Resolve the Question of Venue (a-17,18), which was filed in the District Court ten days after U.S. Government's Motion to Transfer Case to the Northern District of West Virginia (a-14) and nine month before the issuance of the transfer Order. The Honorable Los Mansmann refused to rule on that Motion to Resolve the Question of Venue. He also chose to disregard, as was shown under I above, Magistrate's Report and Recommendation dated January 14, 1982, recommending that the U.S. Government motion to transfer be denied. In view of the facts that the U.S. Government did not present a single concrete fact in favor of transfer, whereas petitioner pro se showed conclusevely that the transfer will be very inconvenient for all of his named witnesses (a-22) and prejudicious to the petitioner pro se because of his health, the Honorable Los Mansmann should have at least ruled on petitioner's Motion

to Resolve the Question of Venue.

The fact that the District Court transferred venue but refused to rule on plaintiff's Motion to Resolve the Question of Venue in view of no established grounds for the transfer, warrants granting by this Court of Petition for a Writ of Certiorari.

III. THE COURT OF APPEALS IN ARRIVING AT ITS DECISION CAN NOT USE DOCUMENTS SUBMITTED BY THE DEFENDANT, DOCUMENTS THAT WERE NEVER FILED IN THE DISTRICT COURT

The duty of the court of appeals is to review the proceedings in the district court and all the facts presented to that court. According to the established judicial procedure the documents that were not before the district court can not be used by the court of appeals.

The respondent, U.S. Government, introduced such documents, the Brief in Support of Motion to Transfer with Exhibits, which was a part of the Brief by the United States in Opposition to Petition for a Writ of Man-

damus. This Brief in Support of Motion to Transfer was never filed in the U.S. District Court for the Western District of Pennsylvania as the Clerk's Docket Entries show. Petitioner moved the U.S. Court of Appeals for the Third Circuit to strike these documents. This motion was denied by the Order of the Court of Appeals dated January 13, 1983, allowing thus into the record of the court of appeals documents that were never filed in the district court.

IV. THE DISTRICT COURT CAN NOT FILE AN APPEAL IN THE UNITED STATES COURT OF APPEALS FOR THE PLAINTIFF WITHOUT HIS KNOWLEDGE AND AGAINST HIS WILL

The U.S. District Court for the Western District of Pennsylvania filed the appeal No. 82-5504 in the U.S. Court of Appeals for the Third Circuit on August 24, 1982 from an unappealable Order, with the petitioner as appellant without his knowledge, moreover, against his will. This forced appeal by the U.S. District Court violated petitioner's

constitutional rights; it also caused to the petitioner expenses. The petitioner believes that no additional argumentation is needed here.

CONCLUSION

The District Court, Honorable Carol Los Mansmann, transferred venue without specifying the basis for such a transfer and in the absence of facts warranting such a transfer.

The ruling of the Court of Appeals in denying Petition for a Writ of Mandamus was contrary to the ruling of the same Court in analogous case in Shutte v. Armco Steel Corporation, 431 F.2d 22 (3rd Cir. 1970).

The District Court transferred venue but refused to rule on plaintiff's Motion to Resolve the Question of Venue, which was filed nine month before the issuance of transfer Order, and in the absence of any established facts for the transfer.

The Court of Appeals in arriving at its decision to deny Petition for a Writ of Man-

damus used documents supplied by the defendant that were never filed in the District Court.

The District Court filed an appeal for the petitioner without his knowledge and against his will.

These decisions and the practices of the U.S. Court of Appeals for the Third Circuit and those of the U.S. District Judge Carol Los Mansmann are departures form the accepted course of the judicial procedure. For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: February 7, 1983.

Respectfully submitted,

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